

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 10-296

BOBBY ZEL GRAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered OCTOBER 6, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION, [NO. CR 2009-532]

HONORABLE WILLARD PROCTOR,
JR., JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Bobby Zel Gray was convicted in a jury trial of aggravated residential burglary, aggravated robbery, three counts of first-degree false imprisonment, two counts of aggravated assault, and third-degree battery. Mr. Gray was sentenced to concurrent prison terms and ordered to serve eleven years in the Arkansas Department of Correction. On appeal, Mr. Gray argues that there was insufficient evidence to support the verdicts because the alleged victims could not identify him. We affirm.

The test for determining the sufficiency of the evidence on appeal is whether the verdict is supported by substantial evidence, direct or circumstantial. *Bowker v. State*, 363 Ark. 345, 214 S.W.3d 243 (2005). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and

conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* Further, when the sufficiency of the evidence is challenged, we will not weigh witness credibility. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

Chris Martin was one of the victims in this case. On December 22, 2008, Mr. Martin lived in a house in North Little Rock with his girlfriend, Telisha Cornice, and his daughter, Tanobia. On that night Mr. Martin returned from the grocery store and parked in his garage, and when he exited his car two men walked up to him and put a gun to his head demanding money. At that time Tanobia was in the living room watching television and Telisha was inside the house talking to her sister on her cell phone. When Mr. Martin told the men that he only had ten dollars, the men took him inside the house at gunpoint. According to Mr. Martin, one of the men was about 5'8" and the other was about 6'2". He said that both men carried guns and wore ski masks. Mr. Martin recalled that when he came home that night he saw a blue SUV parked across the street.

Once inside the house, the taller of the two assailants held Telisha and Tanobia at gunpoint in a back bedroom. Meanwhile, the shorter man held Mr. Martin at gunpoint in the kitchen and continued demanding money. After Mr. Martin advised that he had no money, the man struck Mr. Martin in the head with his pistol. Then the man ordered Mr. Martin to the floor.

After that, the taller man returned to the kitchen from the bedroom and started talking with the shorter man. While they were talking, Mr. Martin was able to go to the back of

the house and get his girlfriend's gun. When Mr. Martin returned to the kitchen the men had exited the kitchen into the garage. A shootout followed. During the shootout, the glass door between the kitchen and garage was shattered. Because the garage door had been put down, the men had to escape through the garage window. According to Mr. Martin, the garage window was either broken out or shot out. Because of their masks, Mr. Martin was unable to identify either of the men.

Telisha Cornice testified that she remembered that she was talking on the phone when the taller of the two men touched her shoulder and took her cell phone. Ms. Cornice testified that the man wore a black cap and a bandana that covered his face, and that she could tell from his eyes that he was black. She described him as a tall, heavy-set man. Because their faces were covered, Ms. Cornice was unable to identify either of the men involved in the crimes.

Ms. Cornice's sister, Angela Powell, testified that during their telephone conversation that night she heard Ms. Cornice scream and then the phone went dead. Mrs. Powell and her husband Reggie Powell, who only lived a block away, hurried over to the house in their car with Mr. Powell driving. When they arrived, Mrs. Powell heard shots being fired and noticed a black man running from behind the house. According to Mrs. Powell, the man ran across the street and entered the passenger's side of a dark-colored SUV. She stated that the man was wearing blue jeans and a tan jacket with a hood. Ms. Cornice identified this man as Bobby Zel Gray.

As the SUV departed the Powells gave chase in their car. They lost track of the SUV around a corner, but after they turned the corner Mrs. Powell witnessed Mr. Gray exit the vehicle. She stated that his face was not covered and that she could have reached out her passenger's side window and touched him. Mrs. Powell stated that Mr. Gray looked at her with a shocked look and took off running. Mr. Gray ran behind a house, and after unsuccessfully trying to find him the Powells returned to the crime scene, where the police had arrived.

Mrs. Powell testified that she then proceeded to drive the car back to where she last saw Mr. Gray and looked for him. She found him walking down the street and flagged down the police, and Mr. Gray was arrested. Mrs. Powell subsequently identified Mr. Gray in a photo lineup as the person she saw that night. Mrs. Powell testified that there was not any doubt in her mind that the person she saw running from the victims' house that night was Mr. Gray.

Mr. Powell corroborated his wife's testimony, and stated that when they arrived that night he saw Mr. Gray running from the house. According to Mr. Powell, Mr. Gray had on dark jeans and a tan jacket and his face was not covered at that time. Mr. Powell identified Mr. Gray as the person they subsequently caught up with around the corner, and he also identified him from a photo lineup. Mr. Powell testified that he was one hundred percent certain that Mr. Gray was the person he saw coming from the back of the victims' house that night.

The State presented evidence that at the time of his arrest Mr. Gray's jeans were torn and his shoes were muddy. Mr. Gray is 6'3" and weighs 250 pounds. The police found a black cap in the fenced-in backyard of the victims' house about forty-five feet from where the assailants escaped through the window. DNA testing established that Mr. Gray's DNA matched the major component of the DNA found on the cap, and that the probability of selecting a random individual of the black population having these genetic markers is about one in 760 quadrillion. In addition, crime-lab analysis of the appellant's jeans, jacket, t-shirt, and shoes that were recovered from his person showed that all of these items contained freshly broken glass fragments.

Mr. Gray's sole argument in this appeal is that substantial evidence does not support his convictions. He does not dispute that two intruders forced their way into the residence and committed the crimes. Mr. Gray contends that the jury was left to speculate as to whether he was one of the intruders.

In support of his challenge to the State's proof of his identity, Mr. Gray notes that none of the victims could identify him. Mr. Gray further asserts that there were numerous inconsistencies in the testimony. While both the victims who testified said the men wore masks, both Mr. and Mrs. Powell testified that the individual who ran from the house was not wearing anything to cover his face. Moreover, no ski mask or bandana was recovered from the scene or appellant's person. Mr. Gray further asserts that Ms. Cornice identified the tall intruder as wearing white tennis shoes, when in fact Mr. Gray was wearing black shoes

when arrested. Both Mr. and Mrs. Powell described a tan jacket, and Mr. Gray submits that he was wearing a hoodie when arrested. Moreover, the Powells lost contact with the man who they saw running from the house, and their identification of Mr. Gray from the photo lineups came only after they viewed him subsequent to his arrest. Mr. Gray further notes that there was no fingerprint or gunshot-residue evidence, that there was no comparison of the glass on his clothing to the broken window, and that another person's DNA was also found on the black hat. For these reasons, Mr. Gray argues that there was insufficient evidence as to his identity and that his convictions should be reversed.

We hold that there was substantial evidence to support the verdicts. On appeal, the appellate court does not weigh the proof favorable to the State against any conflicting evidence favorable to the accused; rather, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict. *See Bowker, supra*. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001).

Viewing only the evidence that supports the verdict, as we must, there was substantial evidence to establish that Mr. Gray was one of the two men who committed the crimes inside the house and then fled through the garage window. Although the victims could not identify Mr. Gray because his face was covered while he was inside the house, both Mrs. Powell and Mr. Powell positively identified him as the person running from the back

of the house and entering the parked SUV. One of the victims, Ms. Cornice, described the taller perpetrator as wearing a black cap, and a black cap matching Mr. Gray's DNA was found in the yard in the vicinity of the window used for escape. Moreover, Ms. Cornice described him as tall and heavy set, and Mr. Gray is 6'3" and weighs 250 pounds. Glass was shattered during the episode, and Mr. Gray's clothes contained freshly broken glass. Upon being spotted by the Powells around the corner from the house, Mr. Gray ran and hid and then was apprehended wearing torn pants and muddy shoes. This evidence sufficiently established, without resort to speculation or conjecture, that Mr. Gray was one of the assailants. Therefore, we affirm each of his convictions.

Affirmed.

KINARD and BROWN, JJ., agree.